JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 14-1234 PA (AJWx)	Date	December 15, 2017
Title	Cunico Corporation v. Custom Alloy Corporation, et al.		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Renee A. Fisher	Not Reported	N/A
Deputy Clerk	Court Reporter	Tape No.
Attorneys Present for Plaintiff:	Attorneys Present for Defendant:	
None	None	

Proceedings: IN CHAMBERS - COURT ORDER

Before the Court is a Motion to Compel Arbitration filed by defendant Custom Alloy Corporation ("Custom Alloy"). (Docket No. 13.) Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument.

I. Factual and Procedural Background

A. Overview of the Dispute

This case involves a contract dispute between plaintiff Cunico Corporation ("Cunico") and Custom Alloy. (See Compl., Notice of Removal Ex. A, Docket No. 1.) Under the parties' agreement, Custom Alloy was to manufacture a die and to form and bend pipe for Cunico. (Id. ¶¶ 5-13.) Cunico alleges that Custom Alloy made various representations that led Cunico to enter into the agreement, under which it would pay Custom Alloy $81,575.00 for the die. (Id. ¶¶ 5, 6, 9.) Cunico alleges that it issued a purchase order incorporating those representations but later discovered them to be false. (Id. ¶¶ 7, 10-12, 14-18; see Compl. Ex. 1.)

B. The Parties' Agreement

The parties' contractual dealings are reflected in various documents exchanged between 2008 and 2012. (See Owens Decl. ¶ 3, Docket No. 13.)[1/] The earliest of those documents were nine

[1/] Cunico objects to the Owens Declaration "on the grounds of lack of capacity, hearsay, speculation, conjecture, irrelevant, and immaterial." (Opp'n at 2, Docket No. 14.) Cunico's objections are overruled. Cunico's capacity, speculation, and conjecture objections are somewhat unclear and are not explained. However, the declaration itself demonstrates Owens's personal knowledge of, and competence to testify about, its contents. The Court does not consider any portions of the declaration that are hearsay but instead looks to the documents referenced therein. Finally, Owens's testimony relates to the parties' dealings and their agreement; it plainly is relevant and material.

"Quotations" issued by Custom Alloy between June 23 and October 9, 2008. (Id. ¶ 3; see Owens Decl. Ex. 1; Benardo Decl. Ex. 1, Docket No. 15-1.) All nine Quotations include the title "Quotation" at the top of the first page. (Owens Decl. Ex. 1 at 1; Benardo Decl. Ex. 1.) The October 9, 2008 Quotation includes six separate entries for products, listing for each a quantity, item number, shipping estimate, unit price, total price for the units in the entry, and specifications or other details about the item. (Owens Decl. Ex. 1 at 1-2.) All nine Quotations include the following at the bottom of the final page:

> FOB High Bridge, NJ 08829/Custom Alloy Terms and Conditions Apply. Delivery quoted is subject to shop availability at time of placement.

(Id. at 2; see Benardo Decl. Ex. 1.)

Custom Alloy's Terms and Conditions include the following provisions:

> 1. Any order received by the Seller shall be construed as a written acceptance of Seller's offer to sell and shall be filled in accordance with the terms and conditions of sale set forth herein. No other terms and conditions shall apply unless specifically accepted by Seller in writing.
>
> . . . .
>
> 13. This agreement constitutes the entire contract between Seller and Buyer. No modification hereof shall be of any force and effect unless in writing and signed by the party claimed to be bound thereby, and no modification shall be effected by an acknowledgement or acceptance by Seller of a purchase order from Buyer containing any different terms and conditions . . . .
>
> 14. This agreement shall be governed by, and construed in accordance with the laws of the State of New Jersey.
>
> 15. The above terms and conditions are presumed accepted unless we hear front the Buyer in writing to the contrary within seven days from the date of our acknowledgement. In the event of any dispute between vendor and purchaser that cannot be settled by officers of each party, it is a condition of acceptance of this order that no legal action is to be taken by vendor or purchaser and that the matter is to be submitted for binding settlement to the American Arbitration Association, New York City, New York.

(Owens Decl. Ex. 2; Zorzi Decl. Ex. C, Docket No. 14-1.)

Around January 7, 2009, Cunico issued its Purchase Order 26860. (Zorzi Decl. ¶ 5, Docket No. 14-1; Zorzi Decl. Ex. A.) The Purchase Order largely repeats the content of Custom Alloy's October 9, 2008 Quotation, including technical requirements for the different items; the specification that the terms of the sale are "NET 30 DAYS"; the designation of "F.O.B.: SOURCE"; and the unit price for each item. (Compare Zorzi Decl. Ex. A, with Owens Decl. Ex. 1.) The Purchase Order directly references the October 9, 2008 Quotation, stating: "CUSTOM ALLOY TO PROVIDE FORMING/THERMAL TREATMENT TO MEET REQUIREMENTS OF B16.9 AND ASTM-A234 WPB PER QUOTE OF 10/9/08." (Zorzi Decl. Ex. A at A-2 (emphasis added).) Purchase Order 26860 differs from the October 9, 2008 Quotation in that the Purchase Order omits one line entry from the Quotation and reduces the quantities of items in four other entries, resulting in reduced net prices. (Compare Zorzi Decl. Ex. A, with Owens Decl. Ex. 1.) These changes result in a total cost to Cunico of $321,009.00, down from $417,394.00 in the Quotation. (Zorzi Decl. Ex. A; Owens Decl. Ex. 1.) The Purchase Order does not refer to other terms or conditions. (See Zorzi Decl. Ex. A.)

On January 15, 2009, Custom Alloy sent to Cunico an "Acknowledgement" that included the changes made in the Purchase Order. (Zorzi Decl. Ex. B; see Zorzi Decl. ¶ 6.) The Acknowledgement does not refer to Custom Alloy's Terms and Conditions. (Zorzi Decl. ¶ 6; see Zorzi Decl. Ex. B.)

At the time of the parties' dealings, Custom Alloy's "standard operating procedure" was to reference its Terms and Conditions in every Quotation and to attach them to every invoice that it issued. (Owens Decl. ¶ 4.) Through the course of their dealings, Custom Alloy sent Cunico many invoices, which Cunico paid. (Id. ¶¶ 4-5.) Custom Alloy's Controller and CFO, William Gregory Owens, has provided a declaration stating that "a complete search of Custom Alloy's records revealed no communication from Cunico stating that it had not received a copy of the Terms and Conditions or requesting a copy of the Terms and Conditions. Likewise, there is no known communication from Cunico objecting to or rejecting the Terms and Conditions." (Id. ¶ 5.)

However, Cunico's Chief Financial Officer, Michael Zorzi, has provided a declaration stating that "[i]n the Cunico files, there is no cover letter, note, email or any writing whatsoever, indicating that the issue of 'Arbitration' or other 'Terms and Conditions' were even discussed before the Purchase Order was accepted by Custom [Alloy] and litigation was filed." (Zorzi Decl. ¶ 10.) Zorzi states that he was not "aware of any Arbitration issues[] until litigation had already begun," and that Custom Alloy's Terms and Conditions were "sent to Cunico[] after the litigation ha[d] already started." (Id. ¶¶ 7, 8.) Zorzi was "quite surprised" that the arbitration provision in Custom Alloy's Terms and Conditions "is not a single separate clearly designated provision, but is designed to surprise the Customer, and is cleverly hidden in boilerplate language, with three different issues contained" in the same paragraph. (Id. ¶ 11.) According to Zorzi, "[n]owhere in the Cunico files is there any writing, which clearly and openly brought to Cunico's attention, that it was surrendering its right to a jury trial, and have an arbitration take place Three Thousand miles away in New York City." (Id. ¶ 12.)

C. Procedural History

Cunico filed its complaint in Los Angeles County Superior Court on November 25, 2013, asserting claims of fraud, breach of written contract, negligent misrepresentation, and conversion. (See Compl.) On February 18, 2014, Custom Alloy removed the case to this Court. (Docket No. 1.) On July 18, 2014, Custom Alloy filed its motion to compel arbitration (Mot., Docket No. 13), which the Court granted (Docket No. 16). Cunico appealed (Docket No. 17), and on September 6, 2016, the Court of Appeals for the Ninth Circuit reversed this Court's decision (Docket No. 22). The Ninth Circuit stated that this Court "did not make the necessary factual findings as to the parties' communications, decide the law applicable to contract formation, or state as a matter of law what constituted the offer, acceptance, or terms of the contract." (Docket No. 22 at 2.) The Ninth Circuit "reverse[d] the order compelling arbitration and dismissing the action, and remand[ed] for the district court to resolve factual issues and make legal conclusions regarding the scope of the parties' agreement." (Id.)

On November 7, 2017, the Court notified the parties that it would benefit from additional briefing. (Docket No. 31.) Specifically, the Court ordered the parties to brief their "views on the enforceability or invalidity of the alleged arbitration provision contained in the 'Terms and Conditions of Sale' relied upon by defendant Custom Alloy Corporation," in particular "choice of law principles, including whether and to what extent the generally-applicable contract law of California, New Jersey, or another state, applies." (Id.) The parties also were to "address the enforceability or invalidity of the alleged arbitration provision under California and New Jersey law and the extent to which the law of either of those states, or another state, applies within the context of the Federal Arbitration Act ('FAA')." (Id.) The parties submitted supplemental briefs (Docket Nos. 35, 36) and, with the Court's permission (Docket No. 37), responses to each other's supplemental briefs (Docket Nos. 38, 29).

II. Legal Standard

"The FAA provides that any arbitration agreement within its scope 'shall be valid, irrevocable, and enforceable,' and permits a party 'aggrieved by the alleged . . . refusal of another to arbitrate' to petition any federal district court for an order compelling arbitration in the manner provided for in the agreement." Chiron Corp. v. Ortho Diagnostic Sys., Inc., 207 F.3d 1126, 1130 (9th Cir. 2000) (citation omitted) (quoting 9 U.S.C. §§ 2, 4). The FAA reflects both a "liberal federal policy favoring arbitration" and the "fundamental principle that arbitration is a matter of contract." AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) (citations omitted) (internal quotation marks omitted). "In line with these principles, courts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." Id. (citations omitted). The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 218, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985). "The court's role under the Act is therefore limited to determining (1) whether a

valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue. If the response is affirmative on both counts, then the Act requires the court to enforce the arbitration agreement in accordance with its terms." Chiron Corp., 207 F.3d at 1130 (citations omitted).

III. Analysis

"When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995). "In a diversity case, the district court must apply the choice-of-law rules of the state in which it sits." Abogados v. AT&T, Inc., 223 F.3d 932, 934 (9th Cir. 2000) (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941); Ledesma v. Jack Stewart Produce, Inc., 816 F.2d 482, 484 (9th Cir. 1987)). The Court therefore looks to California law to determine which state's laws govern whether the parties agreed to arbitration. Under California's three-step "governmental interest" analysis, a court proceeds as follows:

> First, the court examines the substantive law of each jurisdiction to determine whether the laws differ as applied to the relevant transaction. Second, if the laws do differ, the court must determine whether a "true conflict" exists in that each of the relevant jurisdictions has an interest in having its law applied. . . . [I]f more than one jurisdiction has a legitimate interest, the court must move to the third stage of the analysis, which focuses on the "comparative impairment" of the interested jurisdictions.

CRS Recovery, Inc. v. Laxton, 600 F.3d 1138, 1142 (9th Cir. 2010) (quoting Abogados, 223 F.3d at 934). "The fact that two states are involved does not in itself indicate that there is a 'conflict of laws' or 'choice of law' problem. There is obviously no problem where the laws of the two states are identical." Hurtado v. Superior Court, 522 P.2d 666, 669 (Cal. 1974).

In its supplemental briefing on the issue, Custom Alloy argues that New Jersey law applies because the New Jersey choice-of-law clause in its Terms and Conditions is enforceable under California law. (Suppl. Br. at 3-6, Docket No. 36.) Custom Alloy also asserts that Cunico has not identified any differences between California and New Jersey law and that the parties entered into a valid arbitration agreement under either state's law. (Id. at 5-10.) Cunico did not address this issue in detail in its own supplemental briefing, although it states that California law should apply because the goods it ordered were to be shipped to California. (Suppl. Opp'n at 11, Docket No. 35.) In its reply to Custom Alloy's briefing, Cunico argues that California law applies but that the arbitration clause in the Terms and Conditions is unenforceable under both states' laws because they are new material terms that would result in surprise or hardship to Cunico if incorporated into the parties' agreement. (Resp. to Suppl. Br. at 4-6, Docket No. 38.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No.	CV 14-1234 PA (AJWx)	Date	December 15, 2017
Title	Cunico Corporation v. Custom Alloy Corporation, et al.		

The Court cannot simply apply New Jersey law pursuant to Custom Alloy's Terms and Conditions because the Court must determine whether the Terms and Conditions were part of the parties' agreement. See Han v. Samsung Telecomms. Am., LLC, No. CV 13-3823-GW(AJWx), 2013 WL 7158044, at *3 (C.D. Cal. Dec. 16, 2013) (stating that before determining the validity of an arbitration agreement, "the Court must first determine whether Plaintiffs actually agreed to be bound to the choice-of-law provision"). However, as will be shown, the Court need not proceed past the first step of California's choice-of-law inquiry because the applicable provisions of California and New Jersey law do not conflict. See Channell Commercial Corp. v. Wilmington Mach. Inc., No. ED CV 14-2240 DMG (DTBx), 2016 WL 7638180, at *4 (C.D. Cal. June 17, 2016) (analyzing dispute under the Uniform Commercial Code, which both relevant jurisdictions had adopted); see also Hurtado, 522 P.2d at 669.

A. Whether a Valid Agreement to Arbitrate Exists

1. Formation of the Agreement

Custom Alloy argues that the parties' agreement is contained in multiple documents exchanged between 2008 and 2012, including Quotations, Purchase Orders, Change Orders, and Order Acknowledgements, as well as documents referenced therein such as its Terms and Conditions. (Mot. at 3-6.) Cunico contends that its Purchase Order 26860 is the controlling document, and that Custom Alloy's Terms and Conditions are not part of the parties' agreement because Custom Alloy did not refer to them when it acknowledged the Purchase Order. (Opp'n at 1-2.) Cunico also argues that "[t]here is . . . doubt . . . as to what was actually sent to Cunico and when" and suggests, but does not clearly affirm, that it never received the Terms and Conditions until after this litigation began. (Id. at 2-4.) In its reply, Custom Alloy counters that "Cunico's claim that it never received the Terms and Conditions is unavailing" because Custom Alloy sent Cunico nine Quotations that referred to the Terms and Conditions and because it was Custom Alloy's standard practice to send copies of the Terms and Conditions with each of its invoices. (Reply at 3-4, Docket No. 15.)

Both New Jersey and California have adopted the Uniform Commercial Code ("UCC"), which applies here because the parties' agreement relates to the sale of goods. See N.J. Stat. Ann. §§ 12A:1-101, 12A:2-102, 12A:2-105(1); Cal. Com. Code §§ 1101, 2102, 2105(1). Under the UCC, "[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." N.J. Stat. Ann. § 12A:2-204(1); Cal. Com. Code § 2204(1). "Mutual assent usually is manifested by an offer communicated to the offeree and an acceptance communicated to the offeror. An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. . . . The objective manifestation of the party's assent ordinarily controls . . . ." Donovan v. RRL Corp., 27 P.3d 702, 709 (Cal. 2001); see Pagnani-Braga-Kimmel Urologic Assocs., P.A. v. Chappell, 968 A.2d 1242, 1245-46 (N.J. Super. Ct. Law Div. 2008).

"Unless otherwise unambiguously indicated by the language or circumstances . . . an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances . . . ." N.J. Stat. Ann. § 12A:2-206(1); Cal. Com. Code § 2206(1). "A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms." N.J. Stat. Ann. § 12A:2-207(1); Cal. Com. Code § 2207(1). "The additional terms are to be construed as proposals for addition to the contract," although they may automatically become part of the contract under certain circumstances if the parties are merchants. N.J. Stat. Ann. § 12A:2-207(2); Cal. Com. Code § 2207(2). Thus, "the UCC does not require that a party's response mirror an offer to result in a binding contract. The offeree may propose additional or different terms without necessarily having the response viewed as a non-binding counteroffer." Sun Coast Merch. Corp. v. Myron Corp., 922 A.2d 782, 799 (N.J. Super. Ct. App. Div. 2007) (citing N.J. Stat. Ann. § 12A:2-207(1), (3)); see R.W.L. Enters. v. Oldcastle, Inc., __ Cal. Rptr. 3d __, 2017 WL 5781650, at *7 (Ct. App. Nov. 28, 2017).

Here, Custom Alloy's October 9, 2008 Quotation constituted an offer, which Cunico accepted by issuing its Purchase Order 26860. The October 9, 2008 Quotation provided quantities and prices for specific items, technical specifications for those items, delivery terms, and (as further discussed below) other terms and conditions. These details about the specific transaction contemplated by Custom Alloy objectively manifest its intent to be bound. See, e.g., Apex LLC v. Sharing World, Inc., 142 Cal. Rptr. 3d 210, 219 (Ct. App. 2012) (offer to sell was made where it included a certain quantity, price, and period of time for delivery). Custom Alloy's offer bore the title "Quotation," a label often indicating only an invitation to negotiate. See Camsight, Inc. v. Hanamatsu Corp., No. CV 10-01677 MMM (AGRx), 2011 WL 13214314, at *10 (C.D. Cal. Apr. 19, 2011). But a price quotation still may qualify as an offer if sufficiently detailed that a contract will result from its acceptance, and that is the case here. See Newark Bay Cogeneration P'ship, LP v. ETS Power Grp., No. 11-2441 (ES)(CLW), 2012 WL 4504475, at *7 (D.N.J. Sept. 28, 2012) (label of "quotation" did not alter conclusion that proposal was "an unequivocal offer" where, among other things, it "include[d] a number of specific terms including the identification of products, quantities, pricing, timing, and reference to standard terms and conditions" and was treated, at least in part, as an offer by the recipient).

Moreover, the October 9, 2008 Quotation was preceded by eight others, each varying slightly. (See Benardo Decl. Ex. 1.) This indicates an ongoing negotiation that culminated with the October 9, 2008 Quotation. In issuing its Purchase Order 26860, Cunico largely repeated the terms of the October 9, 2008 Quotation rather than proposing its own terms, and it explicitly referred to the October 9, 2008 Quotation. No evidence before the Court suggests that too much time had elapsed for Cunico to accept the offer provided in the Quotation. Finally, Custom Alloy's Terms and Conditions, which were referenced in the October 9, 2008 Quotation, state that "[a]ny order received by the Seller shall be construed as a written acceptance of Seller's offer to sell." (Owens Decl. Ex. 2 ¶ 1.) As will be explained, the Terms and Conditions became a part of the parties' agreement, and that statement is a further objective expression of Custom Alloy's intent to be bound by the terms of its Quotation.

Cunico accepted Custom Alloy's offer by issuing its Purchase Order 26860. It is true that Cunico made some alterations to the terms of the Quotation, most significantly by reducing the quantities of items ordered. But Cunico kept most of the substance of the Quotation intact and did not expressly make its acceptance of the Quotation's offer conditional on Custom Alloy's assent to Cunico's changes. See N.J. Stat. Ann. § 12A:2-207(1); Cal. Com. Code § 2207(1). Any changes made in the Purchase Order were proposals for addition to the parties' agreement and became part of the agreement either by operation of law, see N.J. Stat. Ann. § 12A:2-207(2); Cal. Com. Code § 2207(2), or when Custom Alloy issued its January 15, 2009 Acknowledgement (Owens Decl. Ex. 2 ¶ 13), see N.J. Stat. Ann. § 12A:2-207(3); Cal. Com. Code § 2207(3). Regardless, Cunico accepted the terms of the October 8, 2009 Quotation to the extent they were not in conflict with the terms in Cunico's Purchase Order 26860. See N.J. Stat. Ann. § 12A:2-207(1), (3); Cal. Com. Code § 2207(1), (3).

2. Terms of the Agreement

Custom Alloy's October 9, 2008 Quotation referred to, but did not include or attach, Custom Alloy's Terms and Conditions, where the arbitration provision relied upon by Custom Alloy is found. The Court now considers whether the Terms and Conditions were made a part of the parties' agreement.

Cunico asserts that its own Purchase Order (which does not incorporate Custom Alloy's Terms and Conditions) is the controlling document for the agreement and that there is no evidence that it actually received Custom Alloy's Terms and Conditions. (See Opp'n at 2-4; Suppl. Opp'n at 4-5; Resp. to Suppl. Br. at 1-4.) Custom Alloy argues that Cunico is a sophisticated merchant and that Cunico effectively consented to the arbitration provision by moving forward with the agreement, which incorporated the Terms and Conditions. (Resp. to Suppl. Opp'n at 3-4, Docket No. 39.) According to Custom Alloy, evidence supports its position that Cunico received the Terms and Conditions and Cunico provides no evidence to contrary. (Id. at 4-5.) Custom Alloy also argues, however, that Cunico is bound to the Terms and Conditions even if it did not receive them. (Id. at 5.)

"[A]n agreement need not expressly provide for arbitration, but may do so in a secondary document which is incorporated by reference . . . ." Chan v. Drexel Burnham Lambert, Inc., 223 Cal. Rptr. 838, 842 (Ct. App. 1986); see Newark Bay Cogeneration P'ship, 2012 WL 4504475, at *3, *7-11. In California, "[t]he general rule is that the terms of an extrinsic document may be incorporated by reference in a contract so long as (1) the reference is clear and unequivocal, (2) the reference is called to the attention of the other party and he consents thereto, and (3) the terms of the incorporated document are known or easily available to the contracting parties." DVD Copy Control Ass'n v. Kaleidescape, Inc., 97 Cal. Rptr. 3d 856, 870 (Ct. App. 2009). New Jersey law utilizes a similar test, allowing incorporation by reference "where the underlying contract makes clear reference to a separate document, the identity of the separate document may be ascertained, and incorporation of the document will not result in surprise or hardship." Nova Corp. v. Joseph Stadelmann Elec., Contractors, Inc., No. 07-cv-1104 (PGS), 2008 WL 746672, at *3 (D.N.J. Mar. 18, 2008); see Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 983 A.2d 604, 617 (N.J. Super. Ct. App. Div. 2009).

In California, actual knowledge of the terms incorporated by reference is not required. Wolschlager v. Fidelity Nat'l Title Ins. Co., 4 Cal. Rptr. 3d 179, 185 (Ct. App. 2003). One court has stated that New Jersey does not follow California's "imputed knowledge" standard for incorporation by reference, instead requiring actual knowledge of incorporated terms. See Bacon v. Avis Budget Grp., No. 16-5939 (KM) (JBC), 2017 WL 2525009, at *12-13 (D.N.J. June 9, 2017). But that case was a consumer class action, see id., and New Jersey applies a heightened standard for disputes involving customers and employees than for sophisticated business entities, see Newark Bay Cogeneration P'ship, 2012 WL 4504475, at *11 n.2. Consequently, under New Jersey law, too, it is sufficient if Cunico was put on notice of Custom Alloy's Terms and Conditions. See Selective Way Ins. Co. v. Glasstech, Inc., 191 F. Supp. 3d 350, 358 (D.N.J. 2016).

It is not disputed that Custom Alloy's October 9, 2008 Quotation, and the eight preceding Quotations, provided that "Custom Alloy Terms and Conditions Apply." The phrase was included within two lines of text set apart at the bottom of the last page of each Quotation. (Owens Decl. Ex. 1 at 2; Benardo Decl. Ex. 1.) The Terms and Conditions expressly allowed Cunico to object within seven days to avoid being bound (Owens Decl. Ex. 2 ¶ 15; Zorzi Decl. Ex. C ¶ 15), but Cunico did not do so. Custom Alloy's clear statement in its Quotation is sufficient to have put Cunico on notice of the Terms and Conditions and to now hold Cunico to them. Newark Bay Cogeneration P'ship, 2012 WL 4504475, at *3, *8-10 (proposal constituted offer and incorporated by reference terms and conditions, including arbitration clause, by "clearly and unambiguously" referring to them, stating that the quotation "is based on our standard terms and conditions of sale" (emphasis omitted)); see Selective Way Ins., 191 F. Supp. 3d at 358; Koffler Elec. Mech. Apparatus Repair, Inc. v. Wartsila N. Am., Inc., No. C-11-0052 EMC, 2011 WL 1086035, at *4-5 (N.D. Cal. Mar. 24, 2011); see also Avery v. Integrated Healthcare Holdings, Inc., 159 Cal. Rptr. 3d 444, 457 (Ct. App. 2013) ("The contract need not recite that it 'incorporates' another document, so long as it 'guide[s] the reader to the incorporated document.'" (alteration in original) (quoting Shaw v. Regents of Univ. of Cal., 67 Cal. Rptr. 2d 850 (Ct. App. 1997))).

Cunico assented to the Terms and Conditions when it accepted Custom Alloy's offer; it may not now claim unfair surprise as to those terms. See Newark Bay Cogeneration P'ship, 2012 WL 4504475, at *8-10 (finding that party was bound once it manifested assent to the proposal); Koffler, 2011 WL 1086035, at *4 ("[B]y agreeing to the purchase order which effectively incorporated the General Terms and Conditions, KEMAR consented to it."). The Terms and Conditions were readily available to Cunico. There is no indication that Custom Alloy was withholding or attempting to hide its Terms and Conditions, or that it would not have provided them if asked. Indeed, it was Custom Alloy's standard practice not only to reference its Terms and Conditions in its Quotations but also to attach them to its invoices. (Owens Decl. ¶ 4.) See Garcia v. GMRI, Inc., No. 2:12-cv-10152-DMG-PLA, 2013 WL 10156088, at *7 (C.D. Cal. May 17, 2013) (even if document incorporated by reference was not received, its terms were easily accessible where the document was clearly referenced in the agreement and likely available upon request (citing Shany Co. v. Crain Walnut Shelling, Inc., Civ. No. S-11-1112 KJM EFB, 2012 WL 1979244, at *7 (E.D. Cal. June 1, 2012))).

Indeed, in light of the references to Custom Alloy's Terms and Conditions in the nine Quotations sent to Cunico, it is appropriate to hold Cunico to those terms even if the October 9, 2008 Quotation was not the offer providing the basis for the parties' agreement. See Acceler-Ray, Inc. v. IPG Photonics Corp., No. 5:16-cv-02352-HRL, 2017 WL 1196835, at *4 (N.D. Cal. Mar. 31, 2017) (holding that buyer acquiesced to terms and conditions that had been sent with prior quotations during the parties' negotiations); Nova Corp., 2008 WL 746672, at *3 (reading quotation together with other documents related to project and concluding that external document was incorporated by reference).

The Court's conclusion that the Terms and Conditions became a part of the parties' agreement does not turn on whether Cunico actually received a copy of them. "[T]he critical inquiry concerns whether the Quotation reasonably communicated [the Terms and Conditions], not whether [Cunico] actually read or negotiated the provisions." See Selective Way, 191 F. Supp. 3d at 359; see also Newark Bay Cogeneration P'ship, 2012 WL 4504475, at *8-10 (rejecting argument that terms and conditions were not incorporated because party neither received nor acknowledged them); Lucas v. Hertz Corp., 875 F. Supp. 2d 991, 998-99 (N.D. Cal. 2012) (statement that terms and conditions not received or was given a copy after agreement was signed was "immaterial because the terms of an incorporated document must only have been easily available to him; they need not have actually been provided"). Holding Cunico to Custom Alloy's Terms and Conditions is particularly appropriate because the parties are sophisticated business entities engaged in a commercial transaction for hundreds of thousands of dollars involving custom industrial equipment. See Newark Bay Cogeneration P'ship, 2012 WL 4504475, at *10-11 (D.N.J. Sept. 28, 2012) (principle that a party is bound to terms of a contract even if it did not read them "is amplified when the transaction involves sophisticated commercial parties").

By holding that Cunico is bound by Custom Alloy's Terms and Conditions regardless of whether it received them, the Court need not resolve the factual dispute of whether Cunico did receive them, or when. This precise argument was not before the Court when it issued its prior Order on Custom Alloy's motion, but Custom Alloy made the argument and provided the Court with supporting authority in its recent filings. (Suppl. Br. at 8-10; Resp. to Suppl. Opp'n at 3-5.) Despite requesting and receiving permission to respond to Custom Alloy's supplemental briefing (Suppl. Opp'n at 12; Docket No. 37), Cunico did not respond to this argument. Cunico simply contends that it never received the Terms and Conditions and that they cannot apply because they were not expressly brought to its attention. (See Resp. to Suppl. Br. at 5-8.) Cunico does not address the legal standards for incorporation by reference. Cunico's arguments as to the Terms and Conditions being new and material terms in the agreement miss the mark: Cunico ignores the clear statements in the Quotations, which preceded Cunico's Purchase Order 26860. By failing to address the point, Cunico has conceded that the Terms and Conditions may be incorporated by reference even if it never received them. See, e.g., Ramirez v. GhilottiBros. Inc., 941 F. Supp. 2d 1197, 1210 n.7 (N.D. Cal. 2013) (collecting cases holding that a party conceded an argument by failing to respond to it).

3. Validity of the Arbitration Provision

Cunico argues that the arbitration clause is invalid because it is not a separate provision but rather "is designed to surprise the Customer, and is cleverly hidden in boilerplate language." (Opp'n at 3.) Cunico further argues that the arbitration provision is unconscionable and oppressive because Cunico did not sign the Terms and Conditions, Custom Alloy did not clearly indicate that it wanted Cunico to arbitrate any disputes, and the arbitration provision would require Cunico to arbitrate in New York. (Id. at 3-6.) Custom Alloy counters that the arbitration provision is not unconscionable under either New Jersey or California law because Cunico had equal bargaining power and has not overcome the provision's strong presumption of validity. (Reply at 5-7.) Custom Alloy argues that the arbitral forum selection clause is valid because it does not shock the conscience. (Id. at 8.)

In California, an arbitration provision "must clearly and unambiguously show that the party has agreed to resolve disputes in a forum other than the judicial one" but it need not include any "particular verbal formulation." Badie v. Bank of Am., 79 Cal. Rptr. 2d 273, 289-90 (Ct. App. 1998) (emphasis omitted). The arbitration provision in Custom Alloy's Terms and Conditions provides that "[i]n the event of any dispute between vendor and purchaser that cannot be settled by officers of each party, it is a condition of acceptance of this order that no legal action is to be taken by vendor or purchaser and that the matter is to be submitted for binding settlement to the American Arbitration Association . . . ." (Owens Decl. Ex. 2 ¶ 15; Zorzi Decl. Ex. C ¶ 15 (emphasis added).) This language clearly and unambiguously warns that Cunico would be bound to submit any disputes to arbitration. It is not fatal to the provision's validity that it is found in a document incorporated by reference in the parties' agreement, as "the writing memorializing an arbitration agreement need not be signed by both parties in order to be upheld as a binding arbitration agreement." Serafin v. Balco Props., Ltd., 185 Cal. Rptr. 3d 151, 159 (Ct. App. 2015); see also Wolschlager, 4 Cal. Rptr. 3d at 183-85 (party bound by arbitration provision incorporated by reference).

Similarly, under New Jersey law, "when a contract contains a waiver of rights – whether in an arbitration or other clause – the waiver must be clearly and unmistakably established." Atalese v. U.S. Legal Servs. Grp., L.P., 99 A.3d 306, 314 (N.J. 2014) (internal quotation marks omitted). However, "[n]o particular form of words is necessary to accomplish a clear and unambiguous waiver of rights" as long as "the parties . . . know that there is a distinction between resolving a dispute in arbitration and in a judicial forum." Id. at 314, 315. The arbitration provision in Custom Alloy's Terms and Conditions satisfies this standard as well. See Jaworski v. Ernst & Young U.S. LLP, 119 A.3d 939, 949-50 (N.J. Super. Ct., App. Div. 2015) (finding comparable provision adequate under Atalese). Furthermore, "[t]his situation is not one where an unsophisticated consumer unwittingly agrees to binding arbitration and is uninformed that arbitration waives her right to go to court." Tedeschi v. D.N. DeSimone Constr., Inc., No. 15-8484 (NLH/JS), 2017 WL 1837853, at *4-6 (D.N.J. May 8, 2017) (explaining that Atalese involved a consumer rather than sophisticated business entities). And, as under California law, the provision is no less valid because it is included in a document that Cunico did not sign. See Newark Bay Cogeneration P'ship, 2012 WL 4504475, at *3, *8-10; see also Nova Corp., 2008 WL 746672, at *3 ("It

is not necessary that the document incorporated be one to which the parties to the underlying contract are signatories.").

The arbitration provision is not unconscionable. Both California and New Jersey courts consider procedural and substantive unconscionability. See Kilgore v. KeyBank Nat'l Ass'n, 673 F.3d 947, 963 (9th Cir. 2012) (quoting Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000), overruled on other grounds by Concepcion, 563 U.S. 333); Sitogum Holdings, Inc. v. Ropes, 800 A.2d 915, 921 (N.J. Super. Ct. Ch. Div. 2002). Procedural unconscionability refers to defects in the contracting process, such as oppression or unfair bargaining tactics, a party's surprise, or unequal bargaining power. See Kilgore, 673 F.3d at 963; Sitogum Holdings, 800 A.2d at 921. Substantive unconscionability refers to contractual terms that are so overly one-sided as to shock the conscience. See Kilgore, 673 F.3d at 963; Sonic-Calabasas A, Inc. v. Moreno, 311 P.3d 184, 202 (Cal. 2013); Sitogum Holdings, 800 A.2d at 921. Both California and New Jersey courts consider the two forms of unconscionability on a sliding scale, so that a strong showing of one may suffice despite a weaker showing of the other. See Pokorny v. Quixtar, Inc., 601 F.3d 987, 996 (9th Cir. 2010); B&S Ltd., Inc. v. Elephant & Castle Int'l, Inc., 906 A.2d 511, 521 (N.J. Super. Ct. Ch. Div. 2006).

There is no indication of procedural unconscionability here. The parties are both sophisticated business entities, and no evidence before the Court suggests that the parties had unequal bargaining positions. The evidence reflects that the parties engaged in months of negotiations over costly pieces of equipment, and that they exchanged various forms and contract terms throughout their dealings. (See Owens Decl. Ex. 1; Benardo Decl. Ex. 1; Zorzi Decl. Exs. A, B.) No unfair negotiating practices on the part of Custom Alloy are apparent. See B&S Ltd., 906 A.2d at 521-22; see also Circuit City Stores, Inc. v. Mantor, 335 F.3d 1101, 1106 (9th Cir. 2003) (oppression arises "from an inequality of bargaining power [that] results in no real negotiation and an absence of meaningful choice" (quoting Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 145 (Ct. App. 1997))). As explained above, even if Cunico did not actually receive Custom Alloy's Terms and Conditions, Cunico was on notice of them due to their explicit reference in the October 9, 2008 Quotation and the eight preceding Quotations. The Terms and Conditions gave Cunico the opportunity to object to avoid their inclusion in the parties' agreement (Owens Decl. Ex. 2 ¶ 15; Zorzi Decl. Ex. C. ¶ 15), but Cunico did not do so. Cunico's apparent failure to notice the reference to the Terms and Conditions or to obtain and read them does not make them unconscionable. And notwithstanding Zorzi's personal surprise about the location of the arbitration clause (Zorzi Decl. ¶ 11), the Terms and Conditions are sufficiently clear, and the arbitration provision sufficiently prominent. The Terms and Conditions were validly incorporated into the agreement by reference; their inclusion in the parties' agreement is not procedurally unconscionable.

There also is no indication of substantive unconscionability. Neither a requirement to arbitrate nor the specification that it take place in New York shocks the conscience. See Tutor-Saliba Corp. v. Starr Excess Liab. Ins. Co., No. 2015 WL 13285089 (C.D. Cal. Apr. 23, 2015) (finding that arbitral forum selection clause requiring arbitration in New York was not unconscionable under California law and explaining that "both parties are sophisticated business entities with the resources to travel to resolve

disputes" (citation omitted)); Cal-State Bus. Prods. & Servs., Inc. v. Ricoh, 16 Cal. Rptr. 2d 417, 426-28 (Ct. App. 1993) (upholding forum selection clause and requiring California corporation to litigate dispute with New Jersey defendant in New York); see also B&S Ltd., 906 A.2d at 522. Indeed, by contracting with a party located across the country in New Jersey, Cunico should have been aware of the possibility that it might have to resolve any disputes away from its own location in California. Cunico cannot now "avoid [the arbitration provision] merely by complaining that the deal, in retrospect, was unfair or a bad bargain." See Baltazar v. Forever 21, Inc., 367 P.3d 6, 12 (Cal. 2016).

Cunico has not made a showing, let alone a strong showing, of either procedural or substantive unconscionability. The Court concludes that the arbitration provision is not unconscionable.

B. Whether the Agreement Encompasses the Dispute at Issue

Custom Alloy's Terms and Conditions provide that "[i]n the event of any dispute between vendor and purchaser . . . the matter is to be submitted for binding settlement to the American Arbitration Association . . . ." (Owens Decl. Ex. 2 ¶ 15; Zorzi Decl. Ex. C ¶ 15.) This provision plainly is broad enough to encompass the allegations and claims in Cunico's complaint.

C. Whether Custom Alloy Waived Its Right to Arbitration

Cunico argues that Custom Alloy waived any right to arbitration by not promptly or effectively demanding it and that it has been prejudiced because substantial litigation has occurred. (Opp'n at 3, 6.) Custom Alloy contends that the case has not meaningfully progressed and that it has acted only as necessary to protect its interests. (Reply at 8-9.)

"'Waiver of a contractual right to arbitration is not favored,' and, therefore, 'any party arguing waiver of arbitration bears a heavy burden of proof.' Specifically, '[a] party seeking to prove waiver of a right to arbitration must demonstrate: (1) knowledge of an existing right to compel arbitration; (2) acts inconsistent with that existing right; and (3) prejudice to the party opposing arbitration resulting from such inconsistent acts.'" Richards v. Ernst & Young, LLP, 744 F.3d 1072, 1074 (9th Cir. 2013) (citations omitted).

Here, the parties have not conducted any discovery beyond the Initial Disclosures. (Benardo Suppl. Decl. ¶ 4, Docket No. 15.) There currently is no trial date, and there has been no litigation or court ruling on the merits. The litigation to this stage has primarily concerned only Custom Alloy's assertion of its right to arbitration, and Custom Alloy has not acted inconsistently with that right. (See Benardo Decl. ¶ 3.) Cunico has not demonstrated prejudice justifying a holding of waiver. See Garcia, 2013 WL 10156088, at *2 (finding that there was no waiver where defendant only removed action to federal court). The Court concludes that Custom Alloy did not waive its right to arbitration.

JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No.	CV 14-1234 PA (AJWx)	Date	December 15, 2017
Title	Cunico Corporation v. Custom Alloy Corporation, et al.		

Conclusion

For all of the foregoing reasons, the Court concludes that an arbitration agreement exists between Cunico and Custom Alloy and that the agreement encompasses this dispute. The Court therefore grants Custom Alloy's Motion to Compel Arbitration. Because all of Plaintiff's claims are subject to arbitration, this action is dismissed. See Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d 1053, 1060 (9th Cir. 2004) (stating that district court did not err in dismissing claims subject to arbitration and noting that FAA allows but does not require a stay of court proceedings); Sparling v. Hoffman Constr. Co., 864 F.2d 635, 638 (9th Cir. 1988) (affirming trial court's dismissal of claims referred to arbitration); Martin Marietta Aluminum, Inc. v. Gen. Elec. Co., 586 F.2d 143, 147 (9th Cir. 1978) (affirming grant of summary judgment where claims were subject to arbitration).

IT IS SO ORDERED.